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U.S. DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
AUG 14 2000  
BY DAVID J. MALAND, CLERK  
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**ORIGINAL ANSWER AND COUNTERCLAIM**  
**OF HUMANA HEALTH PLAN OF TEXAS, INC.**  
854204.1



I.

**RESPONSE TO THIRD PARTY DEFENDANT “HEALTH CARRIERS”**

Humana Health Plan of Texas, Inc. (“Humana”) admits that it is an insurance company doing business in the State of Texas, and that it has been served with process and the third party petition in this action. Humana is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in paragraph I, and therefore denies the same.

II.

**Response to Plaintiffs’ Allegations**

Without admitting the substance of any such allegations, Humana admits the allegations in paragraph II that Plaintiffs’ Original Petition filed herein against Defendants/Third-Party Plaintiffs make many vague, broad and wide ranging allegations and that Plaintiff alleges that Defendants/Third-Party Plaintiffs mishandled his patient account and the accounts of other persons similarly situated in the respects listed in subparagraphs A, B, C, and D of paragraph II of the Original Third Party Petition, and that Plaintiff seeks to sue not only for himself but also for a class of persons and that Defendants/Third-Party Plaintiffs have denied all allegations of Plaintiffs.

III.

**Response to Role of “Health Carriers”**

Upon information and belief, and insofar as they pertain to Humana, Humana admits the allegations in the first, second, and last sentences of paragraph III. However, Humana is without knowledge or information sufficient to form a belief as to the truth of the remaining averments about

Humana or any of the averments about the other Health Carriers in paragraph III and therefore denies the same.

IV.

**Response to Contributions/Indemnity Claim**

Humana is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph IV, and therefore denies the same.

V.

**Response to Request for Declaratory Relief**

Humana is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph V, and therefore denies the same.

VI.

**Response to Prayer**

Humana denies that Defendants/Third-Party Plaintiffs are entitled to the relief requested in paragraph VI.

VII.

**Affirmative Defenses**

1. One or more of Defendants/Third-Party Plaintiffs' claims are pre-empted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et. seq.*. Further, on information and belief, some or all of the claims of the Plaintiff's putative class members are pre-empted by ERISA because they relate to benefits allegedly due under one or more employee welfare

benefit plans governed by ERISA, for which Defendants/Third-Party Plaintiffs are seeking contribution and indemnity.

2. Plaintiffs' action, for which Defendants/Third-Party Plaintiffs are seeking contribution and indemnity, is not properly maintainable as a class action as the requirements for a class action are not met.

3. To the extent that one or more of the Plaintiff's putative class members have failed to exhaust their administrative remedies in connection with their claims for benefits allegedly due under an employee welfare benefit plan governed by ERISA, for which Defendants/Third-Party Plaintiffs are seeking contribution and indemnity, Plaintiffs' and Defendants/Third-Party Plaintiffs' claims herein must be dismissed.

4. Upon information and belief, one or more of the Plaintiff's putative class members have assigned their rights to benefits under their employee welfare benefit plan, governed by ERISA, to one or more of the Defendants/Third-Party Plaintiffs, and therefore such Plaintiff's putative class members lack standing to seek recovery of the same from Defendants/Third-Party Plaintiffs and Defendants/Third-Party Plaintiffs are precluded from seeking contribution or indemnity for the same from Third-Party Defendants.

5. Plaintiffs' and Defendants/Third-Party Plaintiffs' claims herein fail to state a claim upon which relief can be granted and therefore should be dismissed.

6. To the extent that any agreements between Defendants/Third-Party Plaintiffs and Humana contains an arbitration clause, Defendants/Third-Party Plaintiffs' claims herein are premature and fail to state a claim.

7. Plaintiffs' and Defendants/Third-Party Plaintiffs' claims herein are barred by the applicable statutes of limitations and should be dismissed.

8. Plaintiffs' and Defendants/Third-Party Plaintiffs' claims herein are barred by the doctrines of waiver, laches, and estoppel and should be dismissed.

9. Humana pleads such other affirmative defenses which cannot be anticipated at this time, but which may become apparent and applicable during the pendency of this lawsuit, by reason of future discovery and by reason of allegations and answers of other parties. Humana specifically reserves its right to amend its answer in order to respond accordingly and to respond to any amended third-party petitions which may be filed.

#### **COUNTERCLAIM**

1. This counterclaim is asserted against Defendants/Third-Party Plaintiffs, who have already appeared herein

2. Humana seeks herein to recover from Defendants/Third-Party Plaintiffs its reasonable and necessary attorney's fees and costs of court expended in the defense of this action, pursuant to 29 U.S.C. §1132(g)

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant Humana Health Plan of Texas, Inc. respectfully prays that (1) this Court deny all relief requested by Third-Party Plaintiff; (2) Third-Party Plaintiffs and Plaintiffs take nothing herein; and (3) Humana Health Plan of Texas, Inc. have and recover its reasonable and necessary attorney's fees and costs of court expended in the defense of this action. 29 U.S.C. §1132(g). Humana Health Plan of Texas, Inc. also seeks such other and

further relief, both general and special, at law or in equity, to which it may be justly entitled.

Respectfully submitted,

By: Judith A. Schening  
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Attorney in Charge for  
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OF COUNSEL:

Fulbright & Jaworski L.L.P.

CERTIFICATE OF SERVICE

This pleading was served in compliance with Rule 5 of the Federal Rules of Civil Procedure.

Judith A. Schening  
Judith A. Schening